

1 EDMUND G. BROWN JR.  
2 Attorney General of the State of California  
3 DAVID S. CHANEY  
4 Chief Assistant Attorney General  
5 ROCHELLE C. EAST  
6 Senior Assistant Attorney General  
7 MICHELLE DES JARDINS  
8 Supervising Deputy Attorney General  
9 TERENCE F. SHEEHY, State Bar No. 203986  
10 Deputy Attorney General  
11 110 West A Street, Suite 1100  
12 San Diego, CA 92101  
13 P.O. Box 85266  
14 San Diego, CA 92186-5266  
15 Telephone: (619) 645-2618  
16 Fax: (619) 645-2581  
17 Email: Terrence.Sheehy@doj.ca.gov

18 Attorneys for Defendant A. Verkouteren

19  
20  
21 IN THE UNITED STATES DISTRICT COURT  
22  
23 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
24  
25 SOUTHERN DIVISION

26 **RICHARD LEE FOSTER,**

27 Plaintiff,

28 08-CV-00554 DMS CAB

ANSWER

29 v.

30 **A. VERKOUTEREN,**

31 Defendant.

32  
33 Defendant A. Verkouteren (Defendant) answers the Complaint, filed on March 24, 2008 (Doc.  
34 No. 1), and admits, denies, and alleges as follows:

35 A.

36 JURISDICTION

37 1. Defendant acknowledges that Plaintiff asserts jurisdiction pursuant to 28 U.S.C. §  
38 1343(a)(3) and 42 U.S.C. § 1983.

39 //

B.

## PARTIES

3 2. Defendant admits Plaintiff resides at Richard J. Donovan Correctional Facility as alleged  
4 in paragraph B.1 of the Complaint. Defendant denies he violated Plaintiff's civil rights.

5       3. Defendant admits that Defendant A. Verkouteren is employed by the California  
6 Department of Corrections and Rehabilitation at Richard J. Donovan Correctional Facility in San  
7 Diego, California. Defendant denies he violated Plaintiff's civil rights or committed two felony  
8 counts of battery on Plaintiff as alleged in paragraph B.2 of the Complaint.

C.

## **CAUSES OF ACTION – COUNT 1**

11 4. Defendant incorporates paragraphs 1 to 3 as if fully set forth herein.

12 5. Defendant admits that Plaintiff refused to accept a cell mate on August 25, 2007, at  
13 Richard J. Donovan Correctional Facility as alleged in Count 1 of the Complaint.

14 6. Defendant admits that Plaintiff refused to “lock up” when Defendant instructed Plaintiff  
15 to do so on August 25, 2007, at Richard J. Donovan Correctional Facility as alleged in Count 1 of  
16 the Complaint.

17       7. Defendant admits that he ordered Officer Williams to place Plaintiff in hand cuffs and take  
18 Plaintiff to his cell on August 25, 2007, at Richard J. Donovan Correctional Facility as alleged in  
19 Count 1 of the Complaint.

20 8. Defendant admits that Plaintiff resisted Officer Williams's attempt to place Plaintiff in  
21 hand cuffs and take Plaintiff to his cell on August 25, 2007, at Richard J. Donovan Correctional  
22 Facility as alleged in Count 1 of the Complaint.

23 9. Defendant admits that he struck Plaintiff once on August 25, 2007, at Richard J. Donovan  
24 Correctional Facility. Defendant denies that he did so in violation of Plaintiff's Eighth Amendment  
25 rights. Defendant struck Plaintiff once on August 25, 2007, at Richard J. Donovan Correctional  
26 Facility, in self defense and only after Plaintiff first attacked Defendant by repeatedly striking  
27 Defendant with closed fists on August 25, 2007, at Richard J. Donovan Correctional Facility.

28 //

1 Defendant denies he punched Plaintiff four times on August 25, 2007, at Richard J. Donovan  
 2 Correctional Facility.

3 10. Defendant denies he used excessive force against Plaintiff as alleged in Count 1 of the  
 4 Complaint.

5 11. Defendant denies he violated Plaintiff's Eighth Amendment rights as alleged in Count 1  
 6 of the Complaint.

7 12. Defendant denies the remaining allegations in Count 1 of the Complaint.

8 **D.**

9 **CAUSES OF ACTION – COUNT 2**

10 13. Defendant incorporates paragraphs 1 to 12 as if fully set forth herein.

11 14. Defendant admits that Plaintiff refused to accept a cell mate on August 25, 2007, at  
 12 Richard J. Donovan Correctional Facility as alleged in Count 2 of the Complaint.

13 15. Defendant admits that Plaintiff refused to "lock up" when Defendant instructed Plaintiff  
 14 to do so on August 25, 2007, at Richard J. Donovan Correctional Facility as alleged in Count 2 of  
 15 the Complaint.

16 16. Defendant admits that he ordered Officer Williams to place Plaintiff in hand cuffs and take  
 17 Plaintiff to his cell on August 25, 2007, at Richard J. Donovan Correctional Facility as alleged in  
 18 Count 2 of the Complaint.

19 17. Defendant admits that Plaintiff resisted Officer Williams's attempt to place Plaintiff in  
 20 hand cuffs and take Plaintiff to his cell on August 25, 2007, at Richard J. Donovan Correctional  
 21 Facility as alleged in Count 2 of the Complaint.

22 18. Defendant admits that he struck Plaintiff once on August 25, 2007, at Richard J. Donovan  
 23 Correctional Facility. Defendant denies that he did so in violation of Plaintiff's Eighth Amendment  
 24 rights. Defendant struck Plaintiff once on August 25, 2007, at Richard J. Donovan Correctional  
 25 Facility, in self defense and only after Plaintiff first attacked Defendant by repeatedly striking  
 26 Defendant with closed fists on August 25, 2007, at Richard J. Donovan Correctional Facility.  
 27 Defendant denies he punched Plaintiff four times on August 25, 2007, at Richard J. Donovan  
 28 Correctional Facility.

19. Defendant denies he used excessive force against Plaintiff as alleged in Count 2 of the Complaint.

20. Defendant denies he violated Plaintiff's Eighth Amendment rights as alleged in Count 2 of the Complaint.

21. Defendant denies the remaining allegations in Count 2 of the Complaint.

E.

## PREVIOUS LAW SUITS AND ADMINISTRATIVE RELIEF

22. Defendant incorporates paragraphs 1 to 21 as if fully set forth herein.

9       23. Defendant lacks information and belief as to other lawsuits Plaintiff has filed and on that  
10 basis cannot admit or deny the statement in Paragraph D.1 of the Complaint.

11 24. Defendant denies that Plaintiff has exhausted his administrative remedies. Defendant  
12 admits Plaintiff has not exhausted his administrative remedies as alleged in Paragraph D.2 of the  
13 Complaint.

F.

# REQUEST FOR RELIEF

16 25. Defendant incorporates paragraphs 1 to 24 as if fully set forth herein.

17 || 26. Defendant denies he violated Plaintiff's Eighth Amendment rights.

18 | 27. Defendant denies Plaintiff is entitled to an injunction.

19 28. Defendant denies Plaintiff is entitled to compensatory or punitive damages, injunctive  
20 relief, attorney's fees, or any other relief. Defendant denies he violated Plaintiff's rights.

G.

## **AFFIRMATIVE DEFENSES**

23 AS SEPARATE AND AFFIRMATIVE DEFENSES, Defendant asserts the following  
24 affirmative defenses, as follows:

## First Affirmative Defense

### **(Failure to State Claim)**

27 29. The Complaint fails to state any claim upon which relief can be granted.

28 //

## Second Affirmative Defense (Failure of Proof)

30. Plaintiff has failed to meet his burden of proving each of the required elements of all claims asserted against Defendant.

## **Third Affirmative Defense**

### **(Failure to Exhaust Administrative Remedies)**

31. Plaintiff's claim is barred by 42 U.S.C. § 1997e(a), in that Plaintiff failed to exhaust his administrative remedies as to the Defendant and/or claims asserted in this action.

## Fourth Affirmative Defense (Qualified Immunity)

32. Defendant is entitled to qualified immunity because there can be no constitutional violation based on the facts alleged or presented, and because Defendant's conduct did not violate clearly established law. At all relevant times, Defendant acted within his scope of discretion, with due care, with a good faith fulfillment of responsibilities pursuant to applicable statutes, rules, regulation, and practices, and with the good faith belief that his actions comported with all applicable federal and state laws.

## **Fifth Affirmative Defense (Privilege)**

33. Plaintiff's claims are barred because Defendant's actions were privileged under the circumstances.

## Sixth Affirmative Defense (Justification)

34. Plaintiff's claims are barred because Defendant's actions were reasonable and justified under the circumstances.

25 //  
26 //  
27 //  
28 //

## Seventh Affirmative Defense (Good Faith)

3       35. Plaintiff's claims are barred because Defendant's actions were at all times performed in  
4 a good faith effort to comply with established California Department of Corrections and  
5 Rehabilitations policies and procedures.

## **Eighth Affirmative Defense (Failure to Mitigate)**

8       36. Plaintiff's claims for damages are barred, or should be reduced, because Plaintiff failed  
9 to exercise reasonable diligence and/or behavior to mitigate the nature and extent of his claims and  
10 alleged injuries.

## **Ninth Affirmative Defense (Punitive Damages)**

13 37. Plaintiff fails to allege facts sufficient to state a claim for compensatory or punitive  
14 damages for any action taken by Defendant in his individual capacity.

## **Tenth Affirmative Defense**

### **Rights, Privileges, Immunities**

17 38. Defendant denies Plaintiff has been deprived of any rights, privileges, or immunities  
18 guaranteed by the laws of the United States or by the laws of the State of California.

## **Eleventh Affirmative Defense**

### **Collateral Estoppel/Res Judicata**

21       39. This action may be subject to the doctrine of collateral estoppel or res judicata due to the  
22 pendency of any related state court proceedings arising from the same incidents and/or due to any  
23 duplicated federal claims.

## Twelfth Affirmative Defense (Legitimate Penological Goals)

26 40. Defendant's actions were reasonably related to advancing legitimate penological goals.

27 //

28 //

**Thirteenth Affirmative Defense****(No Vicarious Liability)**

41. Defendant is not liable for damages under any doctrine of vicarious liability, to the extent  
4 Defendant's alleged liability is based on his supervising capacity.

**Fourteenth Affirmative Defense****(No Recovery for Mental or Emotional Injury)**

7 42. Plaintiff is barred by 42 U.S.C. § 1997e(e) from recovering damages for mental or  
8 emotional injury.

**Fifteenth Affirmative Defense****(Liability for Contributory Conduct)**

11 43. Plaintiff's alleged injuries or damages were the result of his own negligent or deliberate  
12 actions.

**Sixteenth Affirmative Defense****(Reasonableness)**

15 44. Defendant acted reasonably under the circumstances.

**Seventeenth Affirmative Defense****(*Heck v. Humphry*)**

18 45. Plaintiff's claims are barred by *Heck v Humphrey*, 512 U.S. 477 (1994) and *Wilkinson*  
19 *v. Dotson*, 544 U.S. 74 (2005) because a judgment in his favor would necessarily imply the  
20 invalidity of the guilty finding of the 115 Serious Rules Violation hearing for Plaintiff's battery of  
21 Defendant.

**Eighteenth Affirmative Defense****(Reservation of Right to Assert Additional Defenses)**

24 46. Because the Complaint is couched in conclusory terms, Defendant cannot fully  
25 anticipate all affirmative defenses that may be applicable to this action. Accordingly, Defendant  
26 reserves the right to assert additional affirmative defenses, if and to the extent that such  
27 affirmative defenses are applicable.

28 //

1 //

2 **DEMAND FOR JURY TRIAL**3 Defendant hereby demands a trial before a jury on all issues presented by the Complaint  
4 triable to a jury.

5 WHEREFORE, Defendant prays that:

6 1 Judgment be rendered in favor of Defendant and against Plaintiff;  
7 2 Plaintiff takes nothing by the Complaint;  
8 3 Defendant be awarded costs of suit incurred herein; and  
9 4 Defendant be awarded such other and further relief as the Court may deem  
10 necessary and proper.

11 Dated: September 3, 2008

12 Respectfully submitted,

13 EDMUND G. BROWN JR.  
14 Attorney General of the State of California  
15 DAVID S. CHANEY  
16 Chief Assistant Attorney General  
17 ROCHELLE C. EAST  
18 Senior Assistant Attorney General  
19 MICHELLE DES JARDINS  
20 Supervising Deputy Attorney General21 s/Terrence F. Sheehy22 TERRENCE F. SHEEHY  
23 Deputy Attorney General  
24 Attorneys for Defendant A. Verkouteren25  
26  
27  
28  
70135271.wpd  
SD2008700625

1  
2 **CERTIFICATE OF SERVICE BY U.S. MAIL**  
3

4 Case Name: **Foster, Richard Lee v. A. Verkouteren**

5 Case No.: **08-CV-00554 DMS CAB**

6 I declare:

7 I am employed in the Office of the Attorney General, which is the office of a member of the  
8 California State Bar, at which member's direction this service is made. I am 18 years of age or  
9 older and not a party to this matter. I am familiar with the business practice at the Office of the  
10 Attorney General for collection and processing of correspondence for mailing with the United  
11 States Postal Service. In accordance with that practice, correspondence placed in the internal  
12 mail collection system at the Office of the Attorney General is deposited with the United States  
13 Postal Service that same day in the ordinary course of business.

14 On September 3, 2008, I served the following documents:

15 **ANSWER**

16 by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid,  
17 in the internal mail collection system at the Office of the Attorney General at 110 West A Street,  
18 Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

19 **Manual Notice List**

20 The following are those who are **not** on the list to receive e-mail notices for this case (who  
21 therefore require manual noticing):

22 **Richard Lee Foster**  
**E-67301**

23 **Richard J. Donovan Correctional Facility**  
**at Rock Mountain**  
**P.O. Box 799006**  
**San Diego, CA 92179-9006**

24 In Pro Per

25 I declare under penalty of perjury under the laws of the State of California the foregoing is true  
26 and correct and that this declaration was executed on September 3, 2008, at San Diego,  
27 California.

28 M.Torres-Lopez

29 \_\_\_\_\_  
30 Declarant

31 *M. Torres-Lopez*  
32 \_\_\_\_\_  
33 Signature

34 SD2008700625  
35 70135408.wpd

36  
37  
38